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Union Pacific Railroad Company

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS DUNGER,

Plaintiff,

v.

UNION PACIFIC RAILROAD
COMPANY, and DOES 1 through 20,
inclusive,

Defendants.

Case No: 2:18-cv-06374-PA(SSx)

*[Los Angeles Superior Court Case
No. BC73484 before the Honorable
Monica Bachner]*

**DEFENDANT'S COMPENDIUM OF
EVIDENCE IN SUPPORT OF ITS
MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

Date: June 3, 2019

Time: 1:30 p.m.

Ctrm: 9A

State Complaint Filed: April 23, 2018

Trial: July 9, 2019

Pursuant to the Court's Initial Standing Order and applicable rules, Defendant Union Pacific Railroad Company ("Defendant," or "UP") submits this Compendium of Evidence in Support of its Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment. True and correct copies of relevant documents are attached to each declaration, listed below.

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EXH.	DOCUMENTARY EVIDENCE
1	Declaration of Danielle H. Moore (“Moore Declaration”), attaching Exhibits A - OO
2	Exhibit A to Moore Declaration: Relevant excerpts from the transcript of Plaintiff’s deposition
3	Exhibit B to Moore Declaration: Exhibit 3 to the transcript of Plaintiff’s deposition (UP’s General Code of Operating Rules 1.6). The document is authenticated in the transcript of Plaintiff’s deposition at 74:2-13; 75:4-6
4	Exhibit C to Moore Declaration: Exhibit 5 to the transcript of Plaintiff’s deposition (UP’s “Use Family Leave Appropriately” policy). The document is authenticated in the transcript of Plaintiff’s deposition at 89:9-25; 90:1-5
5	Exhibit D to Moore Declaration: Exhibit 8 to the transcript of Plaintiff’s deposition (ethics bulletin issued by UP and entitled “Use Family Medical Leave Appropriately”). The document is authenticated in the transcript of Plaintiff’s deposition at 116:15-25; 117:1-11
6	Exhibit E to Moore Declaration: Exhibit 20 to the transcript of Plaintiff’s deposition (record from an attendance conference involving Plaintiff and dated December 17, 2015). The document is authenticated in the transcript of Plaintiff’s deposition at 179:14-25; 180:1-12
7	Exhibit F to Moore Declaration: Exhibit 21 to the transcript of Plaintiff’s deposition (letter dated December 17, 2015 regarding Attendance Alert). The document is authenticated in the transcript of Plaintiff’s deposition at 179:14-25; 180:1-12

8	Exhibit G to Moore Declaration: Exhibit 9 to the transcript of Plaintiff's deposition (family medical leave letter from UP to Plaintiff dated October 14, 2014). The document is authenticated in the transcript of Plaintiff's deposition at 126:2-17
9	Exhibit H to Moore Declaration: Exhibit 10 to the transcript of Plaintiff's deposition (family medical leave letter from UP to Plaintiff dated November 4, 2014). The document is authenticated in the transcript of Plaintiff's deposition at 131:6-20
10	Exhibit I to Moore Declaration: Exhibit 17 to the transcript of Plaintiff's deposition (family medical leave letter from UP to Plaintiff dated October 6, 2017). The document is authenticated in the transcript of Plaintiff's deposition at 148:2-20
11	Exhibit J to Moore Declaration: Exhibit 7 to the transcript of Plaintiff's deposition ("EDCF Calendar" and call log). The document is authenticated in the transcript of Plaintiff's deposition at 105:14-25; 106:1-18
12	Exhibit K to Moore Declaration: Exhibit 22 to the transcript of Plaintiff's deposition (physician's note pertaining to Plaintiff). The document is authenticated in the transcript of Plaintiff's deposition at 182:14-25; 183:1-20)
13	Exhibit L to Moore Declaration: Exhibit 19 to the transcript of Plaintiff's deposition (family medical leave letter from UP to Plaintiff dated October 27, 2017). The document is authenticated in the transcript of Plaintiff's deposition at 178:18-25; 179:1-4
14	Exhibit M to Moore Declaration: Exhibit 23 to the transcript of Plaintiff's deposition (letter from UP to Plaintiff with the subject

	"Notice of Investigation"). The document is authenticated in the transcript of Plaintiff's deposition at 183:24-25; 184:1-14
15	Exhibit N to Moore Declaration: Exhibit 24 to the transcript of Plaintiff's deposition (transcript of a disciplinary hearing involving Plaintiff that took place on November 17, 2017). The document is authenticated in the transcript of Plaintiff's deposition at 188:1-25
16	Exhibit O to Moore Declaration: Exhibit 25 to the transcript of Plaintiff's deposition (letter from UP to Plaintiff with the subject "Notification of Discipline Assess"). The document is authenticated in the transcript of Plaintiff's deposition at 191:1-17
17	Exhibit P to Moore Declaration: Dungen 00211
18	Exhibit Q to Moore Declaration: Dungen 00212
19	Exhibit R to Moore Declaration: Dungen 00214
20	Exhibit S to Moore Declaration: Dungen 00215
21	Exhibit T to Moore Declaration: Dungen 00216
22	Exhibit U to Moore Declaration: Dungen 00217-222
23	Exhibit V to Moore Declaration: Dungen 00223
24	Exhibit W to Moore Declaration: Dungen 00224
25	Exhibit X to Moore Declaration: Dungen 00225
26	Exhibit Y to Moore Declaration: Dungen 00228-230
27	Exhibit Z to Moore Declaration: Dungen 00231-236
28	Exhibit AA to Moore Declaration: Dungen 00238
29	Exhibit BB to Moore Declaration: Dungen 00239
30	Exhibit CC to Moore Declaration: Dungen 00240
31	Exhibit DD to Moore Declaration: Dungen 00242
32	Exhibit EE to Moore Declaration: Dungen 00244
33	Exhibit FF to Moore Declaration: Dungen 00249-250

34	Exhibit GG to Moore Declaration: Dunger 00253-254
35	Exhibit HH to Moore Declaration: Dunger 00256-257
36	Exhibit II to Moore Declaration: Dunger 00258
37	Exhibit JJ to Moore Declaration: Dunger 00263-264
38	Exhibit KK to Moore Declaration: Dunger 00301-305
39	Exhibit LL to Moore Declaration: Dunger 00255
40	Exhibit MM to Moore Declaration: Dunger 00073-74
41	Exhibit NN to Moore Declaration: Relevant excerpts from the transcript of Andrea Mader's deposition
42	Exhibit OO to Moore Declaration: Relevant excerpts from the transcript of Daniel K. Glenn's deposition
43	Declaration of Tammy Potter, ("Potter Declaration") attaching Exhibits A – O
44	Exhibit A to Potter Declaration: UP's Use Family Leave Appropriately policy, Bates numbered UP000029, which was applicable to Plaintiff and in effect at all times relevant to UP's Motion
45	Exhibit B to Potter Declaration: UP's employee status log for Plaintiff, Bates numbered UP000030, which depicts dates on which Plaintiff was approved to take medical leave during his employment with UP
46	Exhibit C to Potter Declaration: call log, Bates numbered UP000034, which depicts instances in which Plaintiff called UP to request leave via UP's "Layoff Line."
47	Exhibit D to Potter Declaration: calendar, Bates numbered UP000033, which shows the dates on which Plaintiff took medical leave in October 2017

48	Exhibit E to Potter Declaration: relevant excerpts from UP's General Code of Operating Rules, dated April 7, 2010, and Bates numbered UP000037 through UP000038, which were applicable to Plaintiff and in effect at all times relevant to UP's Motion
49	Exhibit F to Potter Declaration: Document, Bates numbered UP000012 through UP000015, UP000018, UP000028, UP000063, UP000083 through UP000088, UP000095, and UP000133 through UP000134 noting Plaintiff's disciplinary history while employed by UP
50	Exhibit G to Potter Declaration: Document, Bates numbered UP000017 and UP000023 noting Plaintiff's history of absences while employed by UP
51	Exhibit H to Potter Declaration: Document, Bates numbered UP000055 through UP000056 noting Plaintiff's history of FMLA leave use while employed by UP
52	Exhibit I to Potter Declaration: UP's Family and Medical Leave Policy, Bates numbered UP000044 through UP000049 and dated August 5, 2015, which was applicable to Plaintiff and in effect at all times relevant to UP's Motion
53	Exhibit J to Potter Declaration: UP's Attendance Policy, Bates numbered UP000024 and dated September 15, 2015, which was applicable to Plaintiff and in effect at all times relevant to UP's Motion
54	Exhibit K to Potter Declaration: UP online ethics bulletin entitled "Use Family Medical Leave Appropriately," Bates numbered UP000031, which was issued to all UP employees on or about April 21, 2017

55	Exhibit L to Potter Declaration: Letter dated November 27, 2017 sent to Plaintiff from UP's Health and Medical Services department regarding the leave he requested on October 5, 2017, Bates numbered UP000148-150
56	Exhibit M to Potter Declaration: Plaintiff's Certification of Health Care Provider dated May 14, 2016 sent to UP
57	Exhibit N to Potter Declaration: Plaintiff's Certification of Health Care Provider dated October 17, 2017 sent to UP
58	Exhibit O to Potter Declaration: Complaint Plaintiff filed with UP dated October 24, 2017
59	Exhibit P to Potter Declaration: Plaintiff's updated Certification of Health Care Provider dated November 16, 2017 sent to UP
60	Declaration of Terrill Maxwell ("Maxwell Declaration"), attaching Exhibits A – D
61	Exhibit A to Maxwell Declaration: The applicable Collective Bargaining Agreement for Mr. Dunger's Union
62	Exhibit B to Maxwell Declaration: The Union's brief submission to the Board regarding Plaintiff
63	Exhibit C to Maxwell Declaration: Carrier's Submission relating to the Union's claim on behalf of Mr. Dunger with attached exhibits.
64	Exhibit D to Maxwell Declaration: The Board's December 11, 2018 decision regarding Mr. Dunger.
65	Declaration of Kali Landmark ("Landmark Declaration"), attaching Exhibits A – E
66	Exhibit A to Landmark Declaration: November 28, 2017, letter received from Derek Battle regarding Thomas Dunger's appeal

67	Exhibit B to Landmark Declaration: January 11, 2018, letter sent to Mr. Battle denying Mr. Dunger's appeal
68	Exhibit C to Landmark Declaration: January 15, 2018, letter received from Mr. Mader regarding his investigation and decision regarding Mr. Dunger
69	Exhibit D to Landmark Declaration: January 23, 2018, letter received from Mr. Battle
70	Exhibit E to Landmark Declaration: Signature page confirming no change in Union Pacific's decision with regard to Mr. Dunger
71	Declaration of Daniel Glenn ("Glenn Declaration"), attaching Exhibits A - S
72	Exhibit A to Glenn Declaration: December 17, 2015 Attendance Alert Notice to Plaintiff
73	Exhibit B to Glenn Declaration: November 9, 2017, letter from Brad Steffel to Thomas Dunger with the subject line "Notice of Investigation"
74	Exhibit C to Glenn Declaration: November 10, 2017, letter from Brad Steffel to Thomas Dunger with the subject line "Notice of Investigation"
75	Exhibit D to Glenn Declaration: UP's General Code of Operating Rules, Rule 1.6, dated April 7, 2010, and Appendix C: Glossary defining "dishonest"
76	Exhibit E to Glenn Declaration: UP's Family & Medical Leave Policy, indicating it was revised August 5, 2015
77	Exhibit F to Glenn Declaration: UP's Use Family Medical Leave Appropriately policy

78	Exhibit G to Glenn Declaration: UP's Ethics Bulletin: Use Family Medical Leave appropriately ("Ethics Bulletin") posting dated April 21, 2017
79	Exhibit H to Glenn Declaration: October 6, 2017, letter from UP's Health and Medical Services Department to Mr. Dunger regarding his leave
80	Exhibit I to Glenn Declaration: Two screenshots from UP's online human resources system showing Mr. Dunger's employee ID number as 0044911 and showing that his intermittent leave was approved as of October 5, 2017, through October 5, 2018
81	Exhibit J to Glenn Declaration: Mr. Dunger's EDCS calendar for October 2017
82	Exhibit K to Glenn Declaration: A report indicating vacation days that were available to Mechanical employees in 2017
83	Exhibit L to Glenn Declaration: call log indicating days in which Mr. Dunger called UP's Layoff Line to request FMLA and/or paid vacation days in 2017
84	Exhibit M to Glenn Declaration: FMLA Absence Detail report indicating days in which Mr. Dunger requested and/or used leaves from 2014 through 2017
85	Exhibit N to Glenn Declaration: Video depicting Plaintiff and others on a fishing boat
86	Exhibit O to Glenn Declaration: Employee Information sheet regarding Mr. Dunger
87	Exhibit P to Glenn Declaration: Employee Information sheet regarding Jassier Vargas

88	Exhibit Q to Glenn Declaration: Employee Information sheet regarding Harrison Scharf
89	Exhibit R to Glenn Declaration: Employee Information sheet regarding John Lemus
90	Exhibit S to Glenn Declaration: Work or School Excuse dated October 19, 2017
91	Declaration of Brad Steffel (“Steffel Declaration”), attaching Exhibits A – C
92	Exhibit A to Steffel Declaration: Video taken from Victor Prado’s phone
93	Exhibit B to Steffel Declaration: November 9, 2017 to Plaintiff
94	Exhibit C to Steffel Declaration: November 15, 2017 letters sent to UP employees who appeared on video on the fishing boat with Plaintiff on October 21, 2017
95	Declaration of Andrew Mader (“Mader Declaration”), attaching Exhibits A - C
96	Exhibit A to Mader Declaration: Transcript of the November 17, 2017, hearing with exhibits marked during the hearing
97	Exhibit B to Mader Declaration: November 27, 2017, letter to Plaintiff
98	Exhibit C to Mader Declaration: January 15, 2018, letter to Kali Landmark

Dated: April 22, 2019

Respectfully submitted,

FISHER & PHILLIPS LLP

By: /s/ Miranda R. Watkins
 Danielle Hultenius Moore
 Miranda R. Watkins
 Attorneys for Union Pacific Railroad
 Company

CERTIFICATE OF SERVICE

I, the undersigned, am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; am employed with the law offices of Fisher & Phillips LLP and my business address is 4747 Executive Drive, Suite 1000, San Diego, California, 92121.

On April 22, 2019 I served the foregoing document entitled **DEFENDANT'S COMPENDIUM OF EVIDENCE IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT** on all the appearing and/or interested parties in this action by placing ☐ the original ☒ a true copy thereof enclosed in sealed envelope(s) addressed as follows:

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☒ [by **ELECTRONIC SUBMISSION**] - I served the above listed document(s) described via the United States District Court's Electronic Filing Program on the designated recipients via electronic transmission through the CM/ECF system on the Court's website. The Court's CM/ECF system will generate a Notice of Electronic Filing (NEF) to the filing party, the assigned judge, and any registered users in the case. The NEF will constitute service of the document(s). Registration as a CM/ECF user constitutes consent to electronic service through the court's transmission facilities.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed April 22, 2019 at San Diego, California.

Susan E. Valle

Print Name

By:

Susan E. Valle

Signature